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IN THE

Supreme Court of the United States

October Term 1947

No. 565

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Kathryn Jongebloed, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Robert Jongebloed, deceased, and

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of Elaine Jongebloed, deceased,

Petitioner,

—against—

ERIE RAILROAD COMPANY,

Respondent.

BRIEF OF ERIE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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ERIE RAILROAD COMPANY,

Respondent.

BRIEF OF ERIE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion by Mr. Justice Botein, rendered on January 17, 1946 at Trial Term, Part XVII, of the Supreme Court, New York County, directing a verdict in favor of the defendant and dismissing the complaint (R. 241-243), has not been reported. The unanimous affirmance without opinion by the Appellate Division, First Department (R.

309-312) is reported in 271 App. Div. 815 (November 8, 1946). The decision by the said Appellate Division denying the plaintiff's motion for leave to appeal to the Court of Appeals is reported in 271 App. Div. 926 (January 24, 1947). The opinion by the Court of Appeals denying the defendant's motion to dismiss the plaintiff's appeal taken as of right to that Court is reported in 296 N.Y. 912 (February 28, 1947). The decision by the Court of Appeals denying the plaintiff's motion for leave to appeal to that Court is reported in 296 N.Y. 994 (April 17, 1947). The unanimous affirmance without opinion by the Court of Appeals (R. 316-318) is reported in 297 N.Y. 534 (July 2, 1947). The decision by the Court of Appeals denying the plaintiff's motion for reargument (R. 320) is reported in 297 N.Y. 603 (October 2, 1947).

Jurisdiction

Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended (28 U.S.C. 344[b]). The unanimous order of affirmance by the Court of Appeals was entered in that Court on July 2, 1947 (R. 316-317). The Court of Appeals denied the plaintiff's motion for reargument on October 2, 1947 (R. 320). The petition for a writ of certiorari was filed February 2, 1948, the time to file having been extended by order of Mr. Justice Jackson on December 31, 1947 (R. 321).

Grounds of Respondent's Opposition to the Petition

The respondent opposes the petition for certiorari on the following grounds:

1. The federal constitutional questions which the petition seeks to present (Pet. p. 12), not having been

raised at Trial Term or in the Appellate Division but having been raised in the Court of Appeals for the first time, were not considered or decided or necessary to the determination of the case by the Court of Appeals. Accordingly, this Court has no jurisdiction to entertain this case under Section 237(b) of the Judicial Code.

2. The federal constitutional questions which the petition seeks to raise under the due process clause of the Fourteenth Amendment (Pet. p. 12) are plainly lacking in substance, amounting to nothing more than the contention that the trial judge and twelve appellate judges of the State of New York who have weighed the plaintiff's case and have found it without merit, were in error.

ARGUMENT

POINT I

This Court has no jurisdiction to review this case, since the asserted federal questions were not properly raised in the New York courts and were not passed upon by the New York courts.

The petition seeks to present to this Court three alleged federal questions involving the due process clause of the Fourteenth Amendment of the Constitution of the United States. Two of the three questions involve the constitutionality of Section 344(a) of the New York Civil Practice Act, the assertion being that this statute, which authorizes the trial and appellate courts of New York, in their discretion, to take judicial notice of the statutory and decisional law of a sister state or of a foreign country, vio-

lates the due process clause of the Fourteenth Amendment. It is asserted (Pet. p. 10) that the validity of this statute was drawn into question below on the ground that it was repugnant to the Fourteenth Amendment, and it is claimed (Br. p. 23) that the federal constitutional questions were presented to the Court of Appeals and that Court could not have affirmed the judgment dismissing the complaint without deciding these questions adversely to the plaintiff.

The jurisdictional statement in the petition (Pet. pp. 10-11) is fatally defective, for it utterly fails to comply with Rule 12(1) of the Rules of this Court. The petition does not specify the stage in the proceedings in the trial or appellate courts of New York at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them is not stated. A conclusory statement is made that the validity of Section 344(a) of the New York Civil Practice Act was drawn into question as being repugnant to the Fourteenth Amendment of the Constitution of the United States, but no facts are stated in support of this conclusion. No quotation or record citation is made to show to this Court the manner in which the alleged federal questions were brought to the attention of, and decided by, the highest court of the State of New York. The petitioner completely fails to sustain the burden of showing that the rulings of the Court of Appeals "were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." The provisions of Rule 12(1) are, of course, mandatory when review of a state court judgment is sought by a petition for writ of certiorari.

The record certified to this Court is barren of any showing whatever of any federal constitutional question having been raised at any stage of the proceedings in the courts of New York. Neither the Appellate Division, First Depart-

ment (271 App. Div. 815) nor the Court of Appeals (297 N.Y. 534), in unanimously affirming the direction of a verdict and the dismissal of the complaint at Trial Term, wrote an opinion. The remittitur of the Court of Appeals (R. 316-317) gives no indication that federal constitutional questions were decided by that Court; and during a period of eight months since the affirmance of the judgment by the Court of Appeals the petitioner has made no effort to obtain an amendment by that Court of its remittitur (cf. *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52, 54 [1934]). Moreover, in the memorandum prepared by the Court of Appeals State Reporter (297 N.Y. 534, 535), there is no indication that any federal question was passed upon by the Court of Appeals.

It is essential to the jurisdiction of this Court in reviewing a decision of a state court that there must appear affirmatively from the record, not only that a federal question was presented for decision to the highest state court having jurisdiction, but that such question was considered, actually decided, and that its decision was necessary to the determination of the case. *Lynch* v. *New York ex rel Pierson, supra.* The burden is upon the petitioner to show affirmatively that this Court has jurisdiction. *Memphis Natural Gas Company* v. *Beeler,* 315 U.S. 649, 651 (1942) (and cases cited therein). Upon the record before this Court, the petitioner not only has utterly failed to sustain this burden, but it is clear that the Court of Appeals could not have passed on any federal question.

Although the plaintiff raised no constitutional question whatever at Trial Term, in his brief in the Appellate Division, First Department, the contention was made that Section 344(a) of the New York Civil Practice Act, in so far as it enables a court to take from a jury the determination of questions of foreign law, violated the plaintiff's

right to trial by jury of those questions, and therefore was unconstitutional under Article I, Section 2, of the Constitution of the State of New York.

After the unanimous affirmance by the Appellate Division of the judgment below (271 App. Div. 815), and after that court had denied the plaintiff's application for leave to appeal to the Court of Appeals (271 App. Div. 926), he filed a notice of appeal to the Court of Appeals as of right. The defendant promptly moved in the Court of Appeals to dismiss the appeal on the ground that the affirmance by the Appellate Division had been unanimous and neither the Appellate Division nor the Court of Appeals had granted permission to appeal. The Court of Appeals denied the defendant's motion, with the following memorandum decision (296 N.Y. 912):

> "Motion to dismiss appeal denied, with $10 costs. While no constitutional question was urged at the Trial Term, it is sufficient for our jurisdictional purposes that, as here, a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision."

The Court of Appeals thus made it clear that the one constitutional question involved in the appeal to that Court was the constitutional question which had been presented to the Appellate Division. In order to ascertain what constitutional question the plaintiff presented to the Appellate Division, it is necessary to look at the plaintiff's briefs in the Appellate Division where it will be found that he raised one constitutional question and only one, namely, whether Section 344(a) of the New York Civil Practice Act was repugnant to Article I, Section 2, of the Constitution of the State of New York which provides that "Trial by jury in

all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." The portions of the plaintiff's briefs in the Appellate Division which mentioned a constitutional question in any way are set forth in full in Appendix A, annexed to this brief.* Clearly, the plaintiff raised in the Appellate Division at most a constitutional question arising under the Constitution of the State of New York and this is the only question which the Court of Appeals conceivably could have considered. No federal constitutional question was raised in the Appellate Division and, therefore, under the rule announced by the Court of Appeals in this very case (296 N.Y. 912), no federal constitutional question was considered by the Court of Appeals.

The federal questions presented in the petition (Pet. p. 12) were raised for the first time in the plaintiff's Court of Appeals brief (pp. 19-29). Indeed, the petitioner here states (Br. p. 23) that copies of his Court of Appeals briefs will be presented to this Court as exhibits with the petition for certiorari to show that the federal constitutional questions were presented to the Court of Appeals for decision. It is thus apparent that the petitioner invokes the jurisdiction of this Court solely upon the ground of the alleged federal constitutional questions which concededly were raised for the first time in the Court of Appeals.

The fact that the petitioner first raised his alleged federal constitutional questions in the Court of Appeals precludes him from invoking this Court's jurisdiction under

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* The plaintiff's briefs in the Appellate Division were handed up to the Court of Appeals at the time of the argument in that Court and, at the direction of Chief Judge Loughran, were filed with the Clerk of that Court as part of the record in this case for the purpose of showing precisely what constitutional question had been presented in the Appellate Division.

Section 237(b) of the Judicial Code. That these questions were disregarded by the Court of Appeals is clear from an unbroken line of decisions in which that Court has refused to consider or pass upon constitutional questions not raised or presented for decision in the lower courts. *Vose* v. *Cockcroft,* 44 N.Y. 415, 424 (1871); *Delaney* v. *Brett,* 51 N.Y. 78, 81 (1872); *Purdy* v. *Erie Railroad Company,* 162 N.Y. 42, 50-51 (1900), writ of error dismissed 185 U.S. 148 (1902); *Dodge* v. *Cornelius,* 168 N.Y. 242, 245 (1901); *Fosdick* v. *Metal Shelter Company, Inc.,* 223 N.Y. 700 (1918), motion for rehearing granted 224 N.Y. 552 (1918); *Nod-Away Company Inc.* v. *Carroll,* 240 N.Y. 252, 253 (1925); *Dobrikin* v. *Union Railway Company,* 250 N.Y. 561 (1929); *Ridall* v. *Courson,* 252 N.Y. 592 (1929); *Matter of Yeannelis* v. *Menides,* 259 N.Y. 513 (1932); *Eddy* v. *Fidelity & Deposit Co.,* 265 N.Y. 276, 282 (1934). This doctrine is a corollary to the limited powers of review granted to the Court of Appeals under Article 6, Section 7, of the Constitution of the State of New York. Cf. *People* v. *Bresler,* 218 N.Y. 567 (1916). The settled rule of the Court of Appeals in this respect, of course, is binding upon this Court. *Purdy* v. *Erie Railroad Company,* 185 U.S. 148 (1902).

It follows that this Court lacks the power to review this case, for no federal question is presented by the record. It consistently has been held that where the highest state court under its settled rules of practice has refused to consider federal questions because they were not properly raised below, this Court has no jurisdiction. *Spies* v. *Illinois,* 123 U.S. 131, 181 (1887); *Erie Railroad Company* v. *Purdy,* 185 U.S. 148, 153-154 (1902); *Layton* v. *Missouri,* 187 U.S. 356, 361 (1902); *Hulbert* v. *City of Chicago,* 202 U.S. 275 (1906); *Cox* v. *Texas,* 202 U.S. 446 (1906); *Louisville & Nashville R.R. Co.* v. *Woodford,* 234 U.S. 46, 51 (1914); *Atlantic Coast Line R.R. Co.* v. *Mims,* 242 U.S. 532,

535(1917); *Missouri Pacific Ry. Co.* v. *Taber,* 244 U.S. 200, 201-202 (1917); *Dorrance* v. *Pennsylvania,* 287 U.S. 660 (1932); *Pennsylvania Railroad Co.* v. *Illinois Brick Co.,* 297 U.S. 447, 463 (1936); *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942); *Bailey* v. *Anderson,* 326 U.S. 203, 206-207 (1945).

POINT II

The asserted federal questions are not substantial.

The petition for certiorari and the brief in support thereof show upon their face that no substantial question of due process of law under the Fourteenth Amendment is presented here. In both the petition (pp. 2-6) and the brief (pp. 19-22, 23-28), long arguments are set forth in support of the petitioner's contention that the trial justice failed to give due weight to the evidence and acted arbitrarily in applying erroneous principles of law, and that the appellate courts of New York have sanctioned such error.

The petitioner has had the opportunity of presenting his case at a trial which occupied four days (R. 29). The trial court's determination was fully reviewed by two appellate courts in New York. Even if the thirteen state judges who have passed upon this case were, in their unanimous judgment, in error, still that would present no question of due process under the Fourteenth Amendment. It is well established that a merely erroneous decision rendered by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Company* v. *Kentucky,* 273 U.S. 269, 273 (1927); *Bonner* v. *Gorman,* 213 U.S. 86, 91 (1909).

The due process clause of the Fourteenth Amendment does not give jurisdiction to this Court to review errors of law alleged to have been committed by state courts in the performance of their duties within the scope of their authority concerning matters non-federal in character. *McDonald* v. *Oregon Railroad and Navigation Co.*, 233 U.S. 665, 670 (1914); *Bell Telephone Company of Pennsylvania* v. *Pennsylvania Public Utility Commission*, 309 U.S. 30, 32 (1940); for the due process clause does not guarantee that the decisions of state courts shall be free from error. *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 299 (1937).

The petitioner states (Br. p. 18) that the method adopted by the trial court of taking judicial notice of the substantive law of New Jersey, the state in which the asserted causes of action arose, "seems to be in full accord with and to be authorized by Section 344(a) of the New York Civil Practice Act * * *." However, it is claimed that this statute enabled the trial court in this case to direct a verdict against the plaintiff upon propositions of foreign law of its own choosing not pleaded or proven,* without any notice to the plaintiff until the end of the trial, and without any opportunity offered to the plaintiff to be heard thereon. Such procedure by the trial court is claimed to have deprived the plaintiff of due process of law guaranteed by the Fourteenth Amendment. The petitioner's complaint of the conduct of the trial proceedings is stated in substantially identical language at pages 6 and 7 of the petition and at pages 17 and 18 of the supporting brief. The three questions presented by the petition are couched in similar language (Pet. p. 12).

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* The applicable New Jersey statutory and decisional law was pleaded (R. 6-10, 17-18). At the trial the plaintiff's attorney offered the applicable New Jersey statutes in evidence and the trial court stated that they would be "deemed in evidence" (R. 240).

To charge one of the most distinguished and highly respected justices of the Supreme Court of New York with having denied a litigant a fair trial and an opportunity to be heard on the merits of his case is a matter of serious concern. The charge comes with extraordinary ill grace in this Court because the plaintiff's attorney, Arthur A. Beaudry, Esq., in an affidavit sworn to September 23, 1947 and filed in the Court of Appeals in support of an application for leave to reargue the appeal in that Court, stated the substance of various discussions between the trial judge and Mr. Beaudry throughout the trial which show conclusively that he was fully apprised of the questions of law which the trial judge was considering and that he had every opportunity to brief and argue all questions of law raised on the trial. The portions of Mr. Beaudry's affidavit referred to are set forth as Appendix B, annexed to this brief.

Wholly apart from whether the plaintiff had ample opportunity in the trial court to be heard on the propositions of New Jersey law relied upon by that court, it is clear that no substantial question of due process of law is raised in this Court under the Fourteenth Amendment. It is obvious that Section 344(a) of the New York Civil Practice Act simply changed the "procedural considerations" in New York state courts which theretofore required foreign law, although found by the court, "to be presented as a question of fact." *United States* v. *Pink*, 315 U.S. 203, 220-221 (1942). Such a statutory procedural change merely dispensing with the technical common law rules of proof could not violate any constitutional right guaranteed to the petitioner by the Fourteenth Amendment.

It is axiomatic that a litigant has no property, in the constitutional sense, in any particular form of remedy. *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933). The Constitution of the United States does not undertake to control the

power of a state to determine by what procedure legal rights may be asserted or legal obligations enforced. *Honeyman* v. *Hanan,* 302 U.S. 375, 378 (1937); *Gelfert* v. *National City Bank,* 313 U.S. 221, 235 (1941); *McDonald* v. *Oregon Railroad and Navigation Co.,* 233 U.S. 665, 670 (1914).

We do not believe that further argument is necessary to show that the alleged federal constitutional questions are so plainly lacking in substance as to require no consideration by this Court.

CONCLUSION

The federal questions which the petition seeks to present were first raised in the Court of Appeals which, under its settled rules of practice, did not even consider, much less decide, these federal questions. This Court, therefore, is without power to review this case. Moreover, the assertion that Section 344(a) of the New York Civil Practice Act is repugnant to the due process clause of the Fourteenth Amendment is plainly lacking in substance.

The petition for a writ of certiorari to the Supreme Court of the State of New York, County of New York, should be denied.

Respectfully submitted,

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APPENDIX A

References in plaintiff's Appellate Division briefs to the constitutional question raised in that Court.

(A) ***Plaintiff's Main Brief in the Appellate Division, Pages 30-31***

"In making its decision the Court apparently intended to take judicial notice of and to make findings as to the law of New Jersey under Section 344-a of the Civil Practice Act, but the Court seems not to have clearly distinguished between fact and law, and most of its findings are findings on the facts made after the sifting and weighing of evidence, or on erroneous theories of law not disclosed in the findings. The few true findings of law in the decision are erroneous, as has been shown.

It is plaintiff's contention, moreover, that disputed questions of New Jersey law, such as the rule and application of *Di Giendemonica* v. *Pennsylvania-Reading Seashore Lines,* supra, if either side believed it applicable and properly proved the same, should have been submitted to the jury for decision as questions of fact, and that Section 344-a of the Civil Practice Act insofar as it authorizes the Court to take judicial notice of foreign law and to find the same, in cases triable by jury, is unconstitutional and void.

Article 1, Section 2, of the Constitution of the State of New York, provides as follows:

'Sec. 2. (Trial by jury; how waived.)

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; * * *'

Prior to the enactment of Section 344-a of the Civil Practice Act, an issue as to what is the law of a foreign jurisdiction was a fact question, and in a case where trial by jury was matter of right, such question was tried and decided by the jury and not by the Court.

This was a most important right and permitted a party during the progress of a trial to know and understand what propositions of law of a foreign jurisdiction were being urged, with an opportunity of calling an expert on the law of such jurisdiction, should such law be in dispute.

Section 344-a of the Civil Practice Act purports to deprive a party of this right, and to permit the Court to make its independent research as to what the law of a foreign jurisdiction is, even on situations which have never been passed upon by the Courts of the foreign jurisdiction, and to make findings or charge the jury on his conception of such law, without any opportunity to a party whatsoever to correct mistakes and to present proof on that subject for submission to the jury.

While no cases have been found passing upon the constitutionality of Section 344-a of the Civil Practice Act, the Court of Appeals, in *Graybar Elec. Co.* v. *New Amsterdam Cas. Co.*, 292 N.Y. 246, suggests that a question of constitutionality is involved and that Section 344-a of the Civil Practice Act might be pronounced unconstitutional whenever the question is presented."

(B) ***Plaintiff's Reply Brief in the Appellate Division. Pages 21-22***

"The Constitutionality of Section 344-a of the Civil Practice Act Is Properly Before This Court.

Respondent's contention in this respect is seriously in error, and under Sections 461 and 445 of the Civil Practice Act, on appeal from a judgment entered on a directed verdict, an exception is deemed to have been taken to every ruling on every question of law.

One ground of liability urged by plaintiff on trial was under the doctrine of *Royal Indemnity* v. *Long Island Railroad, supra,* where this Court characterized a similar situation with reference to the operation of automatic signal systems as a potentially dangerous condition, and appellant relied upon the presumption that the common law of New Jersey was the same as that of New York.

No New Jersey decisions holding to the contrary were produced, and, as shown in appellant's original brief, it is not contributory negligence, as matter of law, in either New York or New Jersey, to cross a railroad while the automatic crossing signals are activated.

The Trial Court held, however, that *Di Giendemonica* v. *Pennsylvania-Reading Seashore Lines,* 123 N.J.L. 296 (fols. 725-726), was authority in New Jersey, contrary to *Royal Indemnity* v. *Long Island Railroad, supra,* and also for a holding of contributory negligence.

Since the New Jersey case, cited by the Court, involved a wholly different situation from the facts in *Royal Indemnity* v. *Long Island Railroad, supra,* and the case at bar, there was an issue of fact as to whether

the common law of New Jersey, on the situation at bar, was different from that of New York, which has always been a jury question, and that the right to trial of this question by the jury was guaranteed by the State Constitution, and that Section 344-a insofar as it impaired such right was unconstitutional."

APPENDIX B

Extracts from affidavit of Arthur A. Beaudry, sworn to September 23, 1947, in support of plaintiff's application for reargument in the Court of Appeals.

"16. At the very beginning of the trial, Mr. Justice Botein asked me whether New Jersey law was involved, and I told him at that time that the plaintiff was relying upon the common law and our rules of decision, particularly Royal Indemnity Co. v. Long Island Railroad Co., supra, except as to the New Jersey bell or whistle statute, which was clear in language and spoke for itself. The Court had been reading Royal Indemnity Co. v. Long Island Railroad Co., supra, and at the end of either the first or second day of the trial, Mr. Justice Botein called my attention to Di Giendemonica v. Pennsylvania-Reading Seashore Lines, 123 N.J.L. 296, which he said would be relied on by the defendant on the question of contributory negligence of the deceased driver of the automobile, and he asked me whether I could find a case in New Jersey holding as do Royal Indemnity Co. v. Long Island Railroad Co., supra, and Maiorano v. Long Island Railroad, 244 N. Y. 387, in this State, that crossing the railroad tracks at a crossing, when the warning signals are active, is not contributory negligence as matter of law, and in accordance with Mr. Justice Botein's request, I gave him, the next day, the case of Jones v. West Jersey & S. R. Co., 7 N. J. Misc. R. 841, 147 A. 381, holding as do the cases in this Court.

17. Mr. Justice Botein had several discussions with me during the trial concerning the evidence as to the

non-blowing of the whistle or sounding of the bell, and whether such evidence was positive or negative, and concerning the law and facts of Royal Indemnity Co. v. Long Island Railroad, supra, and the rule of negligence illustrated by that case, and at one time Mr. Justice Botein advised me that, as he analyzed the evidence, the plaintiff had made out a case sufficient to go to the jury, but, at a still later time, he told me that defendant's attorneys contended that Royal Indemnity v. Long Island Railroad, supra, stated no rule of negligence, but bore merely on the question of contributory negligence of the decedent, and when I explained the 'potential danger' referred to in that case and the rule of negligence applied, he referred to the case at bar as being unusual, and as 'sui generis'.

18. The fact that at the end of the entire case counsel for plaintiff offered the New Jersey statutes material to his case in evidence, and as shown by the record (fols. 718-719), there was some discussion, and the Court finally says that the statutes 'will be deemed in evidence', should indicate very clearly that it was never the understanding that all the statutes and common law of New Jersey were deemed before the Court without their being offered or shown or brought into the record by reference thereto.

19. At the finish of the case, and after the Court had indicated that he was about to grant the defendant's motion for a directed verdict, and the plaintiff's attorney attempted to show that the evidence submitted by him was sufficient to go to the jury, the Court expressed a doubt as to the sufficiency of the evidence as to the non-giving of the signals, and he expressed

the opinion that Royal Indemnity v. Long Island Railroad, supra, referred only to contributory negligence; he asked whether plaintiff's attorney had examined the New Jersey cases to see if the plaintiff's evidence would entitle him to urge some ground of liability under some New Jersey decisions other than the grounds presently being urged by plaintiff.

20. This occurred at about 12:30 or 1:00 P.M. of the day, and just before the noon recess, and plaintiff's attorney was willing to accept what he considered a kind suggestion from the Court, and which he still feels was made in kindness, and he requested until the next morning, but the defendant's counsel strenuously objected to that short delay and insisted that the trial finish that day, and the matter was put over until later in the afternoon, and because of the unexpected illness of a member of his staff, plaintiff's attorney was unable to avail himself of even that short opportunity to embrace the Court's kind suggestion (fol. 721)."